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No. 86-737

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JAMES P. McKELVEY,

Petitioner,

v.

THOMAS K. TURNAGE, ADMINISTRATOR
OF VETERANS' AFFAIRS, and
VETERANS' ADMINISTRATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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The government concedes that a conflict exists between the decisions of the District of Columbia Circuit in this case and the Sixth Circuit in Tinch v. Walters, 765 F.2d 599 (6th Cir. 1985), concerning the question of whether the

VA's willful misconduct regulation discriminates against the handicapped in violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982). Respondent's Brief ("Res. Br.") at 13. This fact alone justifies consideration of this case.

The government argues, however, that the Court should decline to consider the issue presented here because, it contends, few cases arise in which alcoholics seek extensions of the delimiting date in which to use their VA educational benefits. Res. Br. at 14. However, the figures in the government's brief demonstrate that since 1979, 117 alcoholic veterans have sought extensions of the period in which to use their educational benefits. Res. Br. at 14 n.10. Clearly this case would have an impact far beyond the individual litigants involved.

Defendant also asserts that the "unique features" of the VA educational benefits extension legislation make this case unlikely to have significance in other contexts. Res. Br. at 14. Those features are not identified, and it is clear that this Court's guidance on whether a federal agency may write its regulations in such a way as to discriminate against a group of handicapped individuals would have broad applicability.

Respondents also argue that "petitioners do not contend that alcoholism can never be willful misconduct under the statute." Res. Br. at 17. It may be, though it is doubtful, that in a specific factual setting alcoholism could be shown to be willful misconduct. But the VA's regulation precludes consideration of any facts, by defining alcoholism in all cases as willful misconduct.

Hence, this case does not present the "factual question whether [Mr. McKelvey's] alcoholism constituted willful misconduct," Res. Br. at 17, because that question was never considered, either by the VA or the courts. Rather, the case squarely raises the broad legal issue of the authority of federal agencies to define alcoholics in such a way that they are denied the protections of the Rehabilitation Act.

Just yesterday this Court affirmed that "the basic purpose of § 504 . . . is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." School Board of Nassau County v. Arline, No. 85-1277 (March 3, 1987) (slip op. at 9.) The government now asks this Court to ignore the protections afforded

alcoholics by § 504 in order to give force to a regulation that has its "roots" in the era of Prohibition. Res. Br. at 15. The Court should reject this request.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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